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FILED
JAN 22 2007
CLERK

No. 06-857

IN THE

Supreme Court of the United States

BLACKWATER SECURITY CONSULTING, LLC, *et al.*,

Petitioners,

v.

RICHARD P. NORDAN, *etc.*,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF IN OPPOSITION FOR RESPONDENT RICHARD P. NORDAN

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SUMMARY OF REASONS TO DENY THE PETITION

Following Blackwater's removal of this case, the District Court found it lacked subject matter jurisdiction and remanded it back to the state court, pursuant to 28 U.S.C. § 1447(c). Blackwater appealed, and the Fourth Circuit dismissed the appeal, since 28 U.S.C. § 1447(d) prohibits appellate review of a remand order based on lack of subject matter jurisdiction.

There are no compelling reasons to grant Blackwater's Petition, as required by Supreme Court Rule 10. The Petition does not call into controversy any stated rule of law, nor present a decision which conflicts with decisions of this Court or any other federal court. Instead, Blackwater is simply discontent with the manner in which the well-settled law applies. Simply put, Blackwater requests preferential treatment of its case, in a manner different than what is prescribed by the laws set forth by Congress and interpreted by the courts.

The Petition requests (1) a resurrection of the derivative jurisdiction doctrine abolished by Congress in 1986 [28 U.S.C. § 1441(e)], and (2) the creation of a new exception to 28 U.S.C. § 1447(d) which prohibits review of a remand order based on lack of subject matter jurisdiction. Both requests ask this Court to judicially modify the express rules of law enacted by Congress to benefit Blackwater's defense in this case. Respondent respectfully submits that these Congressional enactments should not be rewritten to assist Blackwater in escaping liability for causing the deaths of four Americans.

First, despite Congress having expressly abolished the derivative jurisdiction doctrine in 1986 by its amendment to 28 U.S.C. § 1447(e), Blackwater asks this Court to breathe life back into the doctrine to support its argument that although the District Court lacks subject matter jurisdiction over this case, it should have dismissed the case instead of remanding it. If the derivative jurisdiction doctrine is revived, Blackwater contends that the District Court could not have remanded the case, because the state court lacks jurisdiction.

The flaw with this argument (in addition to the fact that the doctrine has been abolished) is that it assumes, without establishing, that the state court lacks jurisdiction over the case. Blackwater *contends* that the state court lacks jurisdiction because the worker's compensation law under the Defense Base Act [42 U.S.C. § 1651] provides for an exclusive remedy and bars suit for damages. However, the fundamental problem with Blackwater's argument lies in the fact that the applicability of the DBA has never been decided in this case. At this point, the exclusive remedy provision of the DBA is merely a theoretical defense being asserted by Blackwater, nothing more. Both of the lower courts recognized that the determination of coverage under the DBA has not been decided.

Without a determination of the applicability of the DBA to this case, Blackwater cannot establish that the state court lacks jurisdiction. Without establishing that the state court lacks jurisdiction, Blackwater cannot establish that the District Court should have dismissed the case under the derivative jurisdiction doctrine, instead of remanding it. Without establishing that the derivative jurisdiction doctrine would even apply to this case, there is no reason for this Court to review Blackwater's request to resurrect it from the abolition by Congress.

Second, for more than 100 years, this Court has found that an order remanding an action to state court for lack of subject matter jurisdiction is not reviewable by appeal, mandamus, or otherwise. Nonetheless, Blackwater asks this Court to find that this prohibition against appellate review (enacted by Congress in 1887 and upheld by this Court for the past century) should be modified to accommodate Blackwater's defense in this case. There is no controversy or split among the federal Circuits concerning the application of 28 U.S.C. § 1447(d). Instead, Blackwater is simply discontent with the proper application of Section 1447(d)[1], which results in this case being litigated in state court.

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1. All statutory references are to Title 28 of the United States Code, unless otherwise indicated.

In all, there are no compelling reasons which would justify granting the instant Petition. Blackwater's two issues are fundamentally flawed, in that they are exclusively premised on findings of facts which do not exist and the application of an alleged defense under the DBA which has not yet been determined. "A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law." Sup. Ct. R. 10. Here, there are *no* factual findings relating to Blackwater's alleged defense under the DBA and no contention that any of the relevant rules of law are not properly stated—just Blackwater's argument that they were misapplied. Hence, Respondent respectfully contends that there are no compelling reasons for granting the instant Petition.

STATEMENT OF THE CASE

A. Facts Regarding the Underlying Action.

On January 5, 2005, Plaintiff Richard P. Nordan, as Ancillary Administrator for the separate Estates of Scott S. Helvenston, Mike R. Teague, Jerko Gerald Zovko, and Wesley J.K. Batalona, filed a Complaint in North Carolina Superior Court, Wake County, alleging two state law causes of action for wrongful death and fraud. The Complaint alleges a detailed set of facts regarding Blackwater's intentional conduct in causing the deaths of Scott S. Helvenston, Mike R. Teague, Jerko Geraldo Zovko, and Wesley J.K. Batalona ("Decedents"), as well as Blackwater's intentional conduct of fraudulently inducing the Decedents to enter into their respective Independent Contractor Service Agreements.

The Complaint also alleges facts concerning certain contracts under which the Decedents were performing work for Blackwater. Essentially, the Decedents were working for Blackwater to provide private security escorts for the catering services of two *foreign* corporations: ESS Support Services Worldwide ("ESS"), a Cyprus corporation and Regency Hotel and Hospital Company ("Regency"), a Kuwaiti company. [Compl.7]

The factual allegations contained in the Complaint give rise to two state law causes of action for wrongful death and fraud. Blackwater made false representations to the Decedents to induce them to enter into their respective Independent Contractor Service Agreements, and travel to Iraq and surrounding countries to provide private security services for ESS's catering division. The Decedents entered into their respective Independent Contractor Service Agreements in reliance on Blackwater's representations that they would be provided with certain protections, tools and information to allow them to perform their jobs and to secure their safety.

More specifically, the Decedents were told by Blackwater that:

A. Each security mission would be handled by a team of no less than six members;

B. Each security mission would be performed in armored vehicles;

C. The security teams would be comprised of at least two armored vehicles, with at least three security contractors in each vehicle, which would provide for a driver, a navigator and a rear gunner;

D. The rear gunner would have a heavy automatic weapon, allowing the gunner to fight off any attacks from the rear;

E. They would be given at least 24-hours notice prior to any security mission;

F. Each security mission would be subject to a Risk Assessment completed prior to the mission and that if the threat level was too high, they would have the option of not performing the mission;

G. They would be afforded the opportunity to review the travel routes, gather intelligence about each mission, do a pre-trip inspection of the route and determine the proper logistics to carry out the security detail; and

H. They would arrive in the Middle East to have at least 21 days prior to any operations to become acclimated

> to the area, learn the lay of the land, and gather intelligence and learn safe routes in the area. [Pet. App. 35a-36a]

Nevertheless, in an effort to cut costs and improve its bottom line, corporate Blackwater did not provide the Decedents with these promised protections, tools or information. From Baghdad, the Decedents were sent on a security mission *prior to* the commencement date of the contract with ESS. The Decedents were sent out on this security mission without the required six-man team, without armored vehicles, without a rear gunner in each vehicle, without heavy machine weapons, without a Risk Assessment, without a pre-trip inspection of the route, and without even so much as a map of the area. [Compl. ¶15] With three empty ESS flatbed trucks in their charge, the Decedents ultimately became lost, and ended up driving through the center of Fallujah. [Compl. ¶16] This was at a time when even the U.S. military would not travel into the heart of Fallujah. [Compl. ¶17]

As the Decedents were lost, without the needed protections, tools or information that Blackwater had represented they would have, the Decedents were ambushed by insurgents in Fallujah, who literally walked up behind the vehicles and shot all four men with small arms at close range. [Compl. ¶17] Their bodies were pulled into the streets and burned, and their charred remains were beaten and dismembered. Ultimately, two of the burnt bodies were strung up from a bridge over the Euphrates River for all the world to see. *Id.*

Based on the factual allegations contained in the Complaint, the action does not state a claim "arising under" the Constitution, a treaty or any law of the United States. Instead, the Complaint strictly alleges two state law causes of action against an American corporation, over which the federal courts lack jurisdiction to consider.

B. The Proceedings Below.

Shortly after the Complaint was filed in North Carolina state court, Blackwater removed the case to federal court on January 24, 2005, pursuant to 28 U.S.C § 1441. Blackwater contended that there exists original jurisdiction under 28 U.S.C. § 1331 because its federal defense under the Defense Base Act ("DBA") provides for complete preemption of state law. Following removal, Blackwater moved to dismiss the case, claiming that the exclusive remedy provision of the DBA forecloses any suit for damages.

Respondent Richard P. Nordan, as the administrator of the Decedents' estates, filed a motion for remand, arguing that the District Court was without subject matter jurisdiction over the case, since the Complaint contained two state law causes of action for wrongful death and fraud and since an anticipated defense, even one of federal preemption, does not create removal jurisdiction. Respondent also argued that the DBA does not provide for "complete preemption," which might otherwise create federal removal jurisdiction based on an anticipated defense.

In a well-reasoned decision, Chief United States District Court Judge Louise W. Flannigan granted the motion for remand. The District Court noted that under the "well-pleaded complaint" rule, a federal question must arise out of the plaintiff's own claims and not from an anticipated defense. [Pet. App. 40a] Following a detailed analysis, the District Court found that the DBA does not provide for "complete preemption," for the purpose of the exception to the well-pleaded complaint rule. [Pet. App. 41a-50a]

Finding a lack of subject matter jurisdiction, the District Court followed the mandate of 28 U.S.C. § 1447(c), which requires remand. Having no subject matter jurisdiction over the case, the District Court denied Blackwater's motions to dismiss, as moot. [Pet. App. 56a]

Blackwater sought appellate review of the remand order to the Fourth Circuit Court of Appeals, by filing an appeal and a

petition for writ of mandamus. Respondent filed a motion to dismiss for lack of appellate jurisdiction, in that 28 U.S.C. § 1447(d) expressly prohibits appellate review of a remand order based on lack of subject matter jurisdiction. Blackwater opposed the motion to dismiss by arguing that the District Court made a substantive ruling that was "severable" from the remand order itself, which would remove it from the bar of Section 1447(d). Blackwater also argued (for the first time on appeal) that the matter was removable under the federal officer and agency provision of 28 U.S.C. § 1442, despite not having actually removed the case on that ground, nor having argued for removal jurisdiction under Section 1442 at the District Court.

The Fourth Circuit found the "severable order" exception to Section 1447(d) did not apply, because the District Court made no rulings as to the substantive rights of Blackwater, but instead only analyzed the issue of its own jurisdiction, and after finding it lacked jurisdiction, remanded the case. The Fourth Circuit also found that the District Court did not err in remanding the case instead of dismissing it, since the very issue that Blackwater argued as the ground for dismissal (coverage under the DBA) was never actually decided. [Pet. App. 24a] Determining that it was without appellate jurisdiction pursuant to 28 U.S.C. § 1447(d), the Fourth Circuit dismissed Blackwater's appeal and denied its petition for writ of mandamus.

Blackwater subsequently filed petitions for rehearing and rehearing en banc. Both were denied. [Pet. App. 60a] Blackwater then filed a motion to stay the issuance of the mandate pending its petition for certiorari to this Court. The Fourth Circuit denied said motion to stay. Finally, Blackwater filed an application to this Court for a stay of the trial court proceedings pending determination of its Petition. The Chief Justice denied the application.

Despite the two-year delay caused by Blackwater's improper removal and appeal, the case is now beginning to move forward. Respondent is in the process of conducting discovery

and Blackwater has filed its motion to dismiss based on the Defense Base Act.

REASONS FOR DENYING THE PETITION

While Blackwater presented the issue of the applicability of Section 1447(d) as the *second* Question, it should be the primary and threshold issue. If the Fourth Circuit did not err in finding it lacked appellate jurisdiction to hear the case, there is nothing for this Court to consider. Put another way, if Section 1447(d) prohibits review of a remand order based on lack of subject matter jurisdiction, even if erroneously decided, it is immaterial that the District Court remanded the case instead of dismissing, because the issue is not reviewable. It is only after appellate jurisdiction is established that the propriety of the remand order could be considered.

This is not to say that either the Fourth Circuit or the District Court erred, but instead simply a suggestion as to the proper order in which the issues should be considered. Therefore, the Respondent will address Blackwater's Questions Presented in reverse order.

I. The Petition Rests Exclusively on Non-Existent Factual Findings and an Undetermined Question of Law.

As a preliminary matter, it should be noted that both Questions Presented by Blackwater are premised on (1) a fact that has not been decided, and (2) a legal coverage decision that has not been made. More specifically, all of the legal and policy arguments made by Blackwater are built on the *alleged* fact that Blackwater was working for the U.S. military at the time of the subject incident and on the *alleged* claim that the deaths are covered by the Defense Base Act. Both the Fourth Circuit and the District Court below expressly stated that these issues have *not* been resolved:

> The district court made no DBA coverage decision that might form the basis of our review. * * * The fact that the district court's order made no determination of DBA coverage has significance beyond serving to distinguish

> the facts before us from those in *Shives*. * * * Here, the district court made no determination with respect to whether the DBA covered Nordan's claims. [Pet. App. 20a-21a]

Despite the determination of coverage under the DBA remaining an open and highly contested issue (which weighs in favor of *no* coverage), both Questions Presented are strictly based on an *assumption* that the DBA applies. First, Blackwater's request that this Court create a new "constitutional question" exception to the bar against appellate review prescribed Section 1447(d) is expressly premised on the assumption that the DBA applies, which would be the "constitutional question" at issue. If the DBA does not apply, there is no constitutional question at issue and no need for the Court to chip away at Section 1447(d).

Second, Blackwater's argument that the derivative jurisdiction doctrine should be revived (despite is abolition by Congress) is premised on the assumption that the DBA applies, from which Blackwater argues that the state court has no jurisdiction over the case, and the District Court should have dismissed it, instead of remanding. In any event, it is critical to note that each of Blackwater's Questions Presented are strictly premised on the assumption that there exits coverage under the DBA—a finding that both of the lower courts expressly stated does not exist. Therefore, if this Court does not make, in the first instance, the factual finding that Blackwater was working for the U.S. military at the time of the subject incident *and* the legal coverage decision under the DBA, Blackwater's arguments fail and there is not a single ground upon which to grant the Petition.

Since this Court does not generally make such factual findings and legal determinations of worker's compensation coverage in the first instance (especially as here where the record is devoid of any evidence and only contains the factual allegations contained in the Complaint), the fact that coverage under the DBA has not been established should alone be a

sufficient ground to reject Blackwater's Petition. Nonetheless, Respondent will address each of Blackwater's arguments in its Petition, despite the fact that they all fail from a fundamental standpoint, since they are premised on the assumption of coverage under the DBA, which is a determination that has undisputably not been made. [Pet. App. 20a-21a]

II. Fourth Circuit's Application of 28 U.S.C. § 1447(d) Was Proper.

A. A Remand Order Based on Lack of Subject Matter Jurisdiction is not Reviewable.

Since 1887, Congress has forbidden appellate review of orders remanding a case to state court. The modern version of this statute is embodied in 28 U.S.C. § 1447(d), which provides, in relevant part: *"**An order remanding a case to State court from which it was removed is not reviewable on appeal or otherwise** . . . ."* 28 U.S.C. § 1447(d).

The seminal case concerning the interpretation of Section 1447(d) is the Supreme Court's decision in *Thermtron Products v. Hermansdorfer*, 423 U.S. 336 (1976). In *Thermtron*, the Court analyzed the extent of the appellate bar of Section 1447(d). It found that if a district court remands a case to state court for any of the grounds set forth in 28 U.S.C. § 1447(c), the remand order is *not* reviewable "by appeal, mandamus, or otherwise." *Thermtron*, 423 U.S. at 343.

The Court also found that a remand order based on lack of jurisdiction is immune from appellate review, *even if erroneously decided*:

> It is unquestioned in this case and conceded by Petitioners that this section prohibits review of all remand orders issued pursuant to § 1447(c) whether erroneous or not and whether review is sought by appeal or by extraordinary writ. This has been the established rule under § 1447(d) and its predecessors stretching back to 1887. *Id.*

The import of *Thermtron* is that all remand orders based on the grounds set forth in Section 1447(c) are immune from appellate review. *See Id.* at 346. Following the decision in *Thermtron*, the Supreme Court elaborated on the concept that, regardless of whether the remand order was wrongly decided, it is still not reviewable on appeal:

> [W]hile the District Court may have been wrong in its analysis, it clearly stated, citing to §1447(c), that it considered itself without jurisdiction. The District Court therefore thought it was acting in accordance with §1447(c), which allows a remand where an action is "removed improvidently and without jurisdiction." Review of this order, therefore, is presumptively barred by the operation of *28 U.S.C. § 1447*(d). *Volvo of America v. Schwarzer*, 429 U.S. 1331, 1332 (1976).

Over the years the Supreme Court consistently applied the bar articulated by Congress in Section 1447(d). In *Things Remembered v. Petrarca*, 516 U.S. 124 (1995), the Court recognized,

> Congress has placed broad restrictions on the power of federal appellate courts to review District Court orders remanding removed cases to state court. * * * As long as a District Court's remand is based on a timely raised defect in removal procedure or on lack of subject-matter jurisdiction — the grounds for remand recognized by § 1447(c) — a Court of Appeals lacks jurisdiction to entertain an appeal of the remand order under § 1447(d). *Id.* at 127-28: *See also Briscoe v. Bell*, 432 U.S. 404 (1977); *Gravitt v. Southwestern Bell Telephone Co.*, 430 U.S. 723 (1977); and *Quackenbush v. Allstate Insurance Company*, 517 U.S. 706 (1996).

The Supreme Court has articulated the intent of Congress in prohibiting appellate review of a remand order: "Congress' purpose in enacting § 1447(d) was to 'prevent delay in the trial of remanded cases by protracted litigation of jurisdictional

issues.'" *Sheet Metal Workers' International Association v. Carter*, 450 U.S. 949, 952 (1981).

The instant case falls squarely within the express language of 28 U.S.C. §1447(d), as well as the long line of Supreme Court decisions. The District Court issued an order remanding the case back to state court upon a finding that it lacked subject matter jurisdiction over the action. The language of the remand order leaves no doubt that the case was remanded based on the lack of jurisdiction ground articulated in Section 1447(c):

> Consequently, this court lacks subject matter jurisdiction to consider plaintiff's claim, however much they involve coverage issues under the DBA. [App: 47a]
>
> In summary, under the circumstances of this case, this court lacks subject matter jurisdiction over this cause of action, whether asserted on the basis of complete preemption or "unique federal interests." [App: 54a]
>
> Having found no basis for subject matter jurisdiction the court turns to the remaining question of the ultimate disposition of this case. [App: 54a]
>
> Accordingly, where the court finds no basis for subject matter jurisdiction, § 1447(c) compels the court to remand this action to state court. [App: 54a-55a]
>
> Based upon the foregoing, the court GRANTS plaintiff's motion to remand, pursuant to 28 U.S.C. § 1447(c). [App: 56a]

Since the remand order was based on one of the grounds enumerated in Section 1447(c), appellate review of that order, by way of appeal, mandamus or otherwise, is strictly prohibited by Section 1447(d). The Fourth Circuit properly analyzed and applied Section 1447(d), and dismissed Blackwater's appeal for lack of appellate jurisdiction.

B. Blackwater's Reliance on this Court's Pending Review of *Osborn v. Haley* is Not Compelling.

In its Petition, Blackwater relies on the fact that this Court is now reviewing the case of *Osborn v. Haley*, No. 05-593. There,

upon granting the petition for certiorari, the Court stated: "In addition to the Questions presented by the petition, the parties are directed to brief and argue the following Question: Whether the court of appeals had jurisdiction to review the district court's remand order, notwithstanding *28 U.S.C. § 1447(d)*." *Osborn v. Haley*, 127 S.Ct. 2017 (2006). Blackwater suggests that the Court may be considering additional exceptions to the appellate bar of Section 1447(d)—a bandwagon Blackwater hopes to jump on.

However, the Respondent interprets the *Osborn* order granting certiorari much differently. In the underlying decision, *Osborn v. Haley*, 422 F.3d 359 (6th Cir. 2006), the Sixth Circuit reviewed the jurisdictional effect of the Attorney General's certification that a federal employee's conduct was in the course and scope of employment under the Westfall Act, where the court subsequently found that the employee's conduct falls outside the scope of employment, as a matter of law. The issue of whether the remand order was reviewable in light of Section 1447(d) was *never* addressed by the Sixth Circuit.

Thus, the request by this Court for the parties to brief the issue of the applicability of Section 1447(d) suggests to the Respondent that the Court is concerned that the Sixth Circuit may have put the cart before the horse by deciding the merits of the case without first satisfying itself that it had appellate jurisdiction over the matter in light of Section 1447(d). If this interpretation of the Court's request for briefing is correct, it cuts against Blackwater's position and supports the Respondent's contention that the Fourth Circuit did not err in finding it lacked appellate jurisdiction to review the remand order based on a finding of lack of subject matter jurisdiction. Therefore, although the fact that this Court is reviewing *Osborn v. Haley* is Blackwater's lead argument against the application of Section 1447(d), it is not compelling.

C. Congress Expressly Intended to Prohibit Appellate Review of Remand Orders.

The focus of Blackwater's argument that Section 1447(d) should not bar appellate review of the remand order in this case is that "Nothing in the text or legislative history of Section 1447(d) suggests that Congress intended to preclude appellate review of a remand order that relegates to a state court the resolutions of respondents' constitutionally-suspect tort claims." [Pet. 20] Essentially, Blackwater argues that since Congress did not *specifically* say that Section 1447(d) bars appellate review of the remand of a case where the defendant asserts a federal defense under the DBA, it should not apply here.

It is true that Congress did not laboriously list every possible case (and potential defenses) to which Section 1447(d) might apply (which would be nearly impossible). Instead, it crafted a blanket prohibition against appellate review in *every* case that is remanded for want of subject matter jurisdiction. Therefore, the fact that Congress did not mention in the statute or its legislative history that the appellate bar applies to cases where the defendant is asserting a defense under the DBA is not persuasive. Instead, the general rule of Section 1447(d) applies to *all* cases that are remanded for lack of subject matter jurisdiction (irrespective of the individual defenses to the merits the defendant may be alleging). The only exception thereto is the severable order exception articulated by this Court in *City of Waco v. U.S. Fidelity and Guarantee Co.*, 293 U.S. 140 (1934).

D. The Severable Order Exception to Section 1447(d) Does Not Apply in this Case.

At the Fourth Circuit, Blackwater argued that the "severable order" exception to Section 1447(d), set forth by this Court in *City of Waco* and applied by the Fourth Circuit in *Borneman v. United States*, 213 F.3d 819 (4th Cir. 2000), applies in taking the subject remand order out from under the appellate bar of Section 1447(d). While this argument does not seem to appear in

Blackwater's instant Petition, the Fourth Circuit correctly found that the District Court's remand order does not involve a severable order which would bring it within the exception under *City of Waco*. [Pet. App. 19a-21a] In determining that it lacked jurisdiction and therefore must remand the case, the District Court did not make any orders that affected the substantive rights of Blackwater. Even the District Court's finding that the DBA does not provide for complete preemption for removal purposes is "inseverable from its determination that it lacked jurisdiction." *Nutter v. Monongahela Power Company*, 4 F.3d 319, 321 (4th Cir. 1993).

The District Court's remand order was based on a finding of lack of subject matter jurisdiction and does not fall within the *City of Waco* severable order exception. Therefore, based on the express language of Section 1447(d) and a century of American jurisprudence, the remand order is not reviewable "by appeal, mandamus, or otherwise." *Thermtron*, 423 U.S. at 343. Thus, the Fourth Circuit did not err in dismissing the appeal for lack of appellate jurisdiction.

E. There is No Justification for Creating a New Exception to Section 1447(d).

In that the Fourth Circuit's decision is entrenched in long-standing, well-settled legal precedent, Blackwater asks this Court to create a *new* exception to Section 1447(d)—which the Fourth Circuit refused to do.[2] More specifically, Blackwater requests that this Court create a "constitutional-questions exception" to Section 1447(d). [Pet. 23]

Even if this Court was so inclined to nibble away at Congress's prohibition against appellate review of remand orders, there is a fundamental reason why this is not the case to do it. Blackwater cites decisions from eight different Circuits for its contention that "a statutory bar to review does not preclude a federal court from addressing a constitutional claim, absent

2. "For these reasons, we decline to graft a new exception onto the already significantly burdened text of § 1447(d)." [Pet. App. 27a]

clear statement of Congressional intent." [Pet. 23] As a preliminary matter, it must be noted that none of the eight Circuit cases cited by Blackwater analyze or even mention Section 1447(d)—except for one which applied the severable order exception, but did not suggest that a new constitutional question exception be created.[3]

More fundamentally, each of the eight Circuit cases cited by Blackwater concern the reviewability of a constitutional "claim." The problem with applying the logic of those cases to the instant one is that this case does not involve a constitutional "claim." Instead, it involves an anticipated federal "defense" under the DBA. Courts have historically not given the same level of federal protection to anticipated "defenses," as compared to federal or constitutional "claims." The most predominant example of this is the century-old body of law prohibiting an anticipated federal defense, even one of federal preemption, from serving as the basis of federal jurisdiction. *See Franchise Tax Board of California v. Construction Laborers Vacation Trust for Southern California*, 43 U.S. 1, 7 (1983); *Taylor v. Anderson*, 234 U.S. 74, 75 (1914); *Gully v. First National Bank*, 299 U.S. 109, 113 (1936); *Metropolitan Life Insurance Co. v. Taylor*, 481 U.S. 58, 63 (1987); *Caterpillar Inc. v. Williams*, 482 U.S. 386, 392-93 (1987); *City of Chicago v. International College of Surgeons*, 522 U.S. 156, 163 (1997); *Rivet v. Regions Bank of Louisiana*, 522 U.S. 470, 472 (1998); and *Beneficial National Bank v. Anderson*, 539 U.S. 1, 6 (2003).

The problem with basing federal jurisdiction, or in this instance a new exception to Section 1447(d), on an anticipated federal defense is that the defense may simply not pan out in the end. If federal removal jurisdiction could be based on the mere assertion of a federal defense, and the defendant could not eventually prove the defense, the entire basis for the federal jurisdiction would crumble. "Federal courts are courts of limited jurisdiction." *Kokkonen v. Guardian Life Insurance Company of America*, 511 U.S. 375, 376 (1994). As such, jurisdiction is

3. *Aliota v. Graham*, 984 F.2d 1350 (3rd Cir. 1993).

only "authorized by the Constitution and statute, which is not to be expanded by judicial decree," nor the defensive allegations of a defendant. *Id.*

The same principle holds true with respect to Blackwater's request that this Court create a new exception to Section 1447(d) based on its anticipated defense under the DBA. If the Court *did* create a new "constitutional question" exception to Section 1447(d), Blackwater might be able to have the Fourth Circuit review the propriety of the District Court's remand order. Assuming *arguendo* that the Fourth Circuit reversed the District Court's remand and instructed the case be litigated in federal court, if Blackwater ultimately failed in its defense under the DBA, procedural chaos would immediately ensue. At that point in time, the Fourth Circuit would have reviewed an order that should have been barred from review, and the District Court would have litigated a case over which it never had jurisdiction—all because the appellate review and federal jurisdiction was premised on an anticipated defense which ultimately failed.

It is this procedural nightmare that the Court has sought to avoid for the past century by finding that federal jurisdiction cannot be premised upon an anticipated defense.[4] For these reasons, the Court should not now deviate from this principle by creating a "constitutional question" exception to Section 1447(d) based on Blackwater's anticipated "defense" of the exclusive remedy provision of the DBA.

The corollary to not permitting an anticipated federal defense to create federal jurisdiction is the principle that state courts are competent to decide federal defenses. Blackwater takes the "sky is falling" approach in contending that a state court should not determine coverage under the DBA. In fact, Blackwater will have this Court believe that if this case is permitted to proceed as it currently stands, the North Carolina state court would actually be controlling the war in Iraq by

4. The only exception is the complete preemption doctrine, which the District Court found does not apply to the DBA. [Pet. App. 50a]

"regulat[ing] the manner in which the United States armed forces supply lines are kept open under enemy fire in a foreign theater of war." [Pet. 7-8]

Why Blackwater strenuously argues that state courts are so incompetent to decide the issue of coverage under the DBA is unclear. However, this Court has already rejected the notion that state courts are unable to apply federal law. *See Amalgamated Clothing Workers of America v. Richmond Brothers Co.*, 348 U.S. 511, 518 (1955). "[W]hen a state proceeding presents a federal issue, even a pre-emption issue, the proper course is to seek resolution of that issue by the state court." *Chick Kam Choo v. Exxon Corp.*, 486 U.S. 140, 149-50 (1988). Moreover, Circuit courts have continually held that, absent "complete preemption," the affirmative defense of ordinary federal preemption is properly determined by the state courts: "State courts are competent to determine whether state law has been preempted by federal law and they must be permitted to perform that function in cases brought before them, absent a Congressional intent to the contrary." *Railway Labor Executives Assoc. v. Pittsburgh & L.E.R. Co.*, 858 F.2d 936, 942 (3d Cir. 1988); *See also Geddes v. American Airlines, Inc.*, 321 F.3d 1349, 1357 (11th Cir. 2003); and *Roddy v. Grand Truck Western Railroad, Inc.*, 395 F.3d 318 (6th Cir. 2005).

"[T]he fact that a federal statute creates a defense to a state law claim does not necessarily mean that Congress has, by statute, taken the subject away from state tribunals and given it to federal courts." *Vorhees v. Naper Aero Club, Inc.*, 272 F.3d 398, 403 (7th Cir. 2001); *See also Romney v. Lin*, 105 F.3d 806, 813 (2d Cir. 1997) ("There are thus some cases in which a state law cause of action is preempted, but only a state court has jurisdiction to so rule."). "If the federal court rules that the claim is not 'completely preempted' then the federal court has no jurisdiction to rule on a substantive defense and remand is required. The substantive defense of preemption is then a matter for the state court to determine as part of the trial proceedings." *Whitman v. Raley's Inc.*, 886 F.2d 1177, 1181 (9th Cir. 1989).

In addition to Blackwater's anticipated federal defense not providing justification for the creation of a new "constitutional question" exception to Section 1447(d), Blackwater's policy arguments are equally unconvincing. Blackwater asks this Court to abandon the long-standing basic principles of federal jurisdiction to create a new exception to contour to the current President's Administration's "Total Force" policy. While Respondent disputes that Blackwater was a federal contractor or a part of this new concept of "Total Force," American jurisprudence and the fundamental principles of federal jurisdiction should not blow with the wind and change dependent upon how the country decides to fight one war from another.

Blackwater further argues that the effect of the District Court's remand is that a state court in North Carolina will handcuff the President's ability to wage war and change the nation's foreign policy. This is simply an overstatement of the case. Blackwater has wrapped itself in the American flag and declared it part of United States military, in an effort to acquire governmental immunities and escape liability for its wrongful conduct which caused the deaths of four Americans. However, this case is not about interfering with the U.S. Armed Forces operations in Iraq, but instead is about holding a private North Carolina company accountable for its wrongful conduct.

Moreover, this case is not one that involves a political question, as evidenced by the fact that the political question doctrine was never argued at the District Court or Fourth Circuit, but instead only surfaced in Blackwater's Petition, in an effort to achieve Supreme Court review. The North Carolina state court *is* the proper forum to adjudicate the two state law claims for wrongful death and fraud against a private North Carolina company (Blackwater).

In all, there is no justification, in law or policy, to create a new exception to the "already significantly burdened text of Section § 1447(d)"[5] in favor of Blackwater's anticipated defense under the DBA. There being no new exception to the appellate

5. Pet. App. 27a.

bar of Section 1447(d), the Fourth Circuit correctly determined that it was without appellate jurisdiction to review the District Court's remand order based on lack of subject matter jurisdiction. The Fourth Circuit having committed no error, there is no compelling reason to grant the instant Petition.

III. There Is No Relevant Unsettled Question Concerning the *Abolished* Derivative Jurisdiction Doctrine.

Since the District Court found that it was without subject matter jurisdiction, it followed the mandatory language of Section 1447(c) by remanding the case back to state court. *See* 28 U.S.C. § 1447(c). Blackwater now argues that the derivative jurisdiction doctrine should apply to this case, which would arguably require the District Court to dismiss, instead of remanding. Blackwater's argument on the issue of the derivative jurisdiction doctrine rests on two 94 year-old cases, which do not take into account the last century of American jurisprudence, nor the 1986 Congressional amendment which specifically abolished the derivative jurisdiction doctrine. [Pet. 9-10][6]

A. The Derivative Jurisdiction Doctrine was Abolished by Congress and Every Circuit Recognizes the Abolition.

With respect to the derivative jurisdiction doctrine, Blackwater claims that the federal courts are in "disarray" concerning its application. However, the derivative jurisdiction doctrine was expressly abolished by Congress when it added Subsection (e) to 28 U.S.C. § 1441 in 1986.[7] *See* Judicial Improvements Act of 1985, Pub L. No. 99-336, § 3, 100 Stat. 633 (1986); 28 U.S.C. § 1441(e). In a footnote, Blackwater states: "Some courts have mistakenly stated that §1441(f) 'abolishes the derivative jurisdiction doctrine[.]'" [Pet. 12, fn2]

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6. Relying on *Lambert Run Coal Co. v. Baltimore & Ohio R.R.*, 258 U.S. 377 (1922), and *General Investment Co. v. Lake Shore & Michigan So. Railway Co.*, 260 U.S. 261 (1922).

7. Subsection (e) was later re-labeled as Subsection (f) by Congress in 2002.

Thereby, Blackwater suggests that there may be a couple of rogue courts throughout the country who "mistakenly" found that Congress's amendment to Section 1441 abolished the derivative jurisdiction doctrine, and thus the issue should be settled by this Court accepting review of this case. This characterization is misleading.

Not only has Congress expressly abolished the derivative jurisdiction doctrine through its amendment to Section 1441, but *every single* Circuit throughout the country has recognized that the derivative jurisdiction doctrine has been abolished, and there is no "disarray" of the Circuits for this Court to resolve. *See Lloyd v. FDIC*, 22 F.3d 335 (1st Cir. 1994); *Nordlicht v. New York Telephone Co.*, 799 F.2d 859 (2nd Cir. 1986); *Bradshaw v. General Motors Corp.*, 805 F.2d 110 (3rd Cir. 1986); *Rosciszewski v. Arete Assocs.*, 1 F.3d 225 (4th Cir. 1993); *Foval v. First Nat'l Bank of Commerce*, 841 F.2d 126 (5th Cir. 1988); *Carpenter v. Dalrymple*, 894 F.2d 407 (6th Cir. 1990); *United States v. Brandt Construction Co.*, 826 F.2d 643 (7th Cir. 1987); *North Dakota v. Fredericks*, 940 F.2d 333 (8th Cir. 1991); *Emrich v. Touche Ross & Co.*, 846 F.2d 1190 (9th Cir. 1988); *State of Oklahoma v. Jan Graham and Chickasaw Nation*, 846 F.2d 1258 (10th Cir. 1988); and *Hollis v. Florida State Univ.*, 259 F.3d 1295 (11th Cir. 2001).

Although Blackwater asserts as its first and primary argument supporting its Petition that there is a split in the Circuits concerning the application of the derivative jurisdiction doctrine, Congress expressly abolished it and every Circuit court has recognized the abolition. This alone constitutes grounds for denial of the Petition. However, to the extent that this Court considers Blackwater's requested revival of the abolished derivative jurisdiction doctrine, its argument is inherently flawed.

Blackwater suggests that this Court should hear the instant case to determine "whether the Derivative-Jurisdiction Doctrine continues to apply where *both* the federal court and the state court lack jurisdiction over a removed case." [Pet. 13.] However,

there is nothing in the record to suggest that the state court lacks jurisdiction over this case. The Complaint consists of two North Carolina state law claims for wrongful death and fraud. These are claims over which the state court clearly has jurisdiction. Nonetheless, Blackwater's argument is premised upon its assertion that the DBA applies and thus provides the exclusive remedy to the survivors of the Decedents (which remedy lies in the Department of Labor and not in the state court).

However, as stated by both the District Court and the Fourth Circuit, the issue of coverage under the DBA has not been decided in this case. [Pet. App. 20a-21a] Moreover, the facts contained in the record before the Court reveal that the Defense Base Act does *not* cover the subject deaths.

B. The Defense Base Act Does Not Apply.

The DBA is comprised of a detailed statutory scheme by which compensation may be paid to certain "employees," engaged in very particularized scopes of work, for injury or death resulting from negligent conduct. An analysis of these three key elements that trigger coverage under the DBA shows that the defense will be unsuccessful.

First, the DBA specifically only applies to "employees." The DBA provides that "the provisions of the Longshoremen's and Harbor Workers' Compensation Act . . . shall apply in respect to the injury or death of any *employee* engaged in any employment" in six specific categories of work. [Emphasis] 42 U.S.C. § 1651(a). Here, the only facts in the record are those contained in the Complaint. The Complaint specifically states that the four Decedents were not employees, but instead were independent contractors: "Helvenston, Teague, Zovko and Batalona, and each of them, were hired by BLACKWATER as independent contractors, and were at no relevant time employees of BLACKWATER." [Compl: ¶31]. Moreover, the Complaint alleges and the record reflects that these four men signed "Independent Contractor Service Agreements." [Pet. App. 35a] These agreements expressly state: "Contractor acknowledges

that it is solely an independent contractor."[8] Therefore, Blackwater's defense under the DBA will fail because the Decedents were independent contractors, not employees which might otherwise be covered under the DBA.

Second, the DBA only applies to individuals working within a limited scope of six different categories of employment. *See* 42 U.S.C. § 1651(a)(1)-(6). Blackwater claims that 42 U.S.C. § 1651(a)(4) applies because it was a subcontractor to the United States government through a series of contracts running from Blackwater to Regency to ESS to Kellogg Brown and Root ("KBR") to the U.S. government.[9] However, Blackwater has never been able to prove this contractual chain.

Moreover, within the last few months, the United States Army, at the direction of former Secretary of Defense Donald Rumsfeld, has stated that KBR has never directly hired a private security contractor, including Blackwater, in support of the Army's Logistics Civil Augmentation Program ("LOGCAP"). [Resp App. 1a] Moreover, Haliburton, the parent company to KBR, has also disclaimed a contractual relationship between Blackwater and the U.S. government, when it stated on December 7, 2006, that "all information available to KBR confirms that Blackwater's work for ESS was not in support of KBR and not under a KBR contract." [Resp. App. 4a] In addition, Haliburton stated that Blackwater services were "not directly billed to any government contract." [Resp. App. 4a] Therefore, Blackwater will be unable to prove that the Decedents were working within any of the six limited scopes of employment to which the DBA applies. Thus, coverage under the DBA is doubtful.

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8. The agreements also state: "Nothing contained in this Agreement shall be deemed to constitute either BSC [Blackwater], the Contractor or Customer as an agent, representative, partner, or joint venturer or employee of the other party for any purpose." [4th Cir. Appellants' App.: ¶ 20.15, pgs. 387, 402, 420, 438]

9. *See* Blackwater's Notice of Removal: 4th Cir. Appellants' App.: 38, ¶5-6]

Third, as with most worker's compensation statutes, the DBA applies to injury or death resulting from negligent or reckless conduct—not intentional conduct. *See Fisher v. Halliburton*, 390 F.Supp.2d 610 (S.D. Tx. 2005)[10] This issue caught the attention of the Fourth Circuit, who asked during oral argument whether the DBA would provide the exclusive remedy for an employer who intentionally shot and killed one of its employees. Despite Blackwater's statement that it *would*, the case law developed in the proceedings below indicates that the exclusivity provision provided by the DBA does not apply to intentional conduct. Here, the only two causes of action involved are the intentional torts of wrongful death and fraud. Therefore, such intentional conduct falls outside the purview of the worker's compensation law under the DBA.

It is unlikely that the DBA will apply in this case. However, in any event, the record is clearly not developed to the point where the Court could *assume* coverage under the DBA (especially in light of both lower courts stating that no such determination has been made). If no assumption of coverage under the DBA can be made, then there is no reason to assume that the state court lacks jurisdiction over the case. If the state court does not lack jurisdiction over the case, there is no reason to consider the resurrection of the derivative jurisdiction doctrine, and the District Court did not err in remanding the case instead of dismissing it.

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10. In *Fisher*, the court denied a motion to dismiss based on the DBA, finding it does not apply to intentional torts: "A very narrow exception to the DBA's exclusive liability provision applies where the employer acted with specific intent to injure the employee. . . . On a Motion to Dismiss, the Court must accept Plaintiffs' allegations as true. Plaintiffs have alleged facts that fall within the exception to the exclusivity provision of the DBA for intended harm. Accordingly, Defendants' motion to dismiss based on the DBA must be denied." *Id.* at *9.

C. Upon a Finding of Lack of Jurisdiction, the District Court Must Remand.

"If at any time before judgment it appears that the district court lacks subject matter jurisdiction, the case shall be remanded." 28 U.S.C. § 1447(c). The mandatory language of Section 1447(c) has been interpreted to mean that once the District Court determines it is without jurisdiction, it must do nothing other than remand. "The plain language of § 1447(c) gives 'no discretion to dismiss rather than remand an action' removed from state court over which the court lacks subject-matter jurisdiction." *Roach v. West Virginia Regional Jail and Correctional Facility Authority*, 74 F.3d 46, 49 (4th Cir. 1996), citing *International Primate Protection League v. Administrators of Tulane Ed. Fund*, 500 U.S. 72, 89 (1991). Here, the District Court had no discretion to dismiss, in that Section 1447(c) mandates only remand upon a finding of lack of subject matter jurisdiction.

D. The Futility Exception to Section 1447(c) Does not Apply.

Similar to the unsuccessful defendant in *International Primate*, Blackwater argues that, notwithstanding the clear requirements of Section 1447(c), the District Court should have dismissed the case instead of remanding it, pursuant to a "futility" exception. In support thereof, Blackwater relies on the *only* federal decision which has recognized and applied a futility exception: the Ninth Circuit's decision in *Bell v. City of Kellogg*, 922 F.2d 1418 (9th Cir. 1991).

In *Bell*, the court recognized the requirement of Section 1447(c) that upon a finding of lack of subject matter jurisdiction "the case shall be remanded." *Id.* at 1424. However, the Ninth Circuit then determined that there should be a "futility" exception to that rule, claiming that "[w]e do not believe Congress intended to ignore the interest of efficient use of judicial resources." *Id.* at 1425-26. In its concern of not running afoul of any comity issues, the Ninth Circuit analyzed the

decision in *M.A.I.N. v. Commissioner Main Dept. Of Human Servs.*, 876 F.2d 1051, 1054 (1st Cir. 1989).

In *M.A.I.N.*, the defendants similarly argued that despite the District Court finding a lack of subject matter jurisdiction, it should have dismissed the case instead of remanding it to state court. The First Circuit was careful to not carelessly apply a "futility" exception to the general rule that, unless there is an "absolute certainty" that remanding the case would be futile, courts should not digress from the mandate prescribed by Congress in 28 U.S.C. § 1447(c):

> We think, however, that the District Court erred in departing from the literal words of § 1447(c), which, on their face, give it no discretion to dismiss rather than remand an action. And, we are unwilling to read such discretion into the statute, here, because we cannot say with absolute certainty that remand would prove futile. It is conceivable, though unlikely, that M.A.I.N. will succeed in finding a state forum for its claims. *Id.* at 1054.

The First Circuit completed its analysis with the caveat: "But the fact that we believe a certain legal result *unlikely*, as a matter of state law, it is not sufficient grounds for reading an exception into the absolute statutory words 'shall be remanded.'" *Id.* at 1055.

In light of these cautionary words by the First Circuit, the Ninth Circuit in *Bell* analyzed the issue and determined that it was "absolutely certain" that the remand there would be futile. As such, it applied the futility exception and dismissed the case instead of remanding it, despite its finding of lack of removal jurisdiction. *Bell*, 922 F.2d at 1425.

However, nothing even close to an "absolute certainty" exists in the instant case. Here, Blackwater contends that the District Court should have dismissed the case after finding a lack of subject matter jurisdiction, instead of remanding it, because the state court is without jurisdiction due to its defense under the DBA. However, this argument that the DBA applies

and thus there exists no state jurisdiction because of its exclusivity provisions is just that—Blackwater's "argument." There has been no legal determination of coverage under the DBA, as expressly noted by both of the courts below. [Pet. App. 20a-21a]

In all, there is a substantial likelihood that Blackwater will *not* prevail on its federal defense under the DBA, in that the Decedents were independent contractors (not employees), were not working within any of the six limited scopes of employment to which the DBA applies, and were killed as the result of intentional conduct. In any event, there is clearly not an "absolute certainty" that Blackwater's defense under the DBA will prevail. Thus, there can be no finding that the state court lacks jurisdiction and remand would be futile. To the extent that there exists a viable "futility" exception to the express prescription by Congress that upon a finding of lack of subject matter jurisdiction the case "shall" be remanded, said futility exception does not apply in this case because there is no "absolute certainty" that the DBA will apply and the state court will lack jurisdiction.

E. The Claim of Differential Treatment of the Abolished Derivative Jurisdiction Doctrine is a Red Herring.

In another effort to create an issue which might fall within the category of cases this Court accepts to review, Blackwater contends that the derivative jurisdiction doctrine (now abolished) has been given different application to cases removed under 28 U.S.C. § 1441 than those removed under 28 U.S.C. § 1442. This is an irrelevant issue in the case. First, the derivative jurisdiction doctrine was abolished by Congress in 1986. *See* 28 U.S.C. § 1441(f).

Second, Blackwater did not remove the case to federal court under Section 1442, nor argue removal under this section at the District Court. [Pet. App. 23a, fn8] Instead, removal was based exclusively on Section 1441. Although Blackwater attempts to skirt this important fact by stating, "this is neither here nor

there,"[11] the legal basis for removal is absolutely critical to the jurisdictional analysis. It was not until the appeal at the Fourth Circuit that Blackwater abandoned its efforts to justify removal jurisdiction under Section 1441 on the basis of complete preemption under the DBA, and ran a new theory up the flag pole which consisted of an argument that, although the case was not removed under Section 1442, there should exist removal jurisdiction because Blackwater was acting at the direction of a federal officer or agency.

While the record below contains a thorough analysis as to why Blackwater is not entitled to removal under Section 1442,[12] the issue was properly not considered by the Fourth Circuit, since the case was not removed under Section 1442, nor argued as such at the District Court. [App.23a, fn8] Therefore, Blackwater's current attempt to achieve Supreme Court review by arguing that this Court should resolve the "differential treatment" of the abolished derivative jurisdiction doctrine between removals under Section 1441 and Section 1442—where Blackwater failed to remove under the latter statute—is an irrelevant issue and one which does not necessitate this Court's review in this case.

In all, Blackwater's various attempts to achieve review of this case based on the abolished derivative jurisdiction doctrine fail and certainly do not provide a compelling reason to grant the Petition.

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11. Pet. 17.

12. Appellees' 4th Circuit Answer Brief; pgs. 34-42.

CONCLUSION

Based on the foregoing, as well as the well-reasoned decisions by the Fourth Circuit and the District Court, the Respondent respectfully requests that the Court deny Blackwater's Petition.

Respectfully submitted,

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APPENDIX

RESPONDENTS APPENDIX

SECRETARY OF THE ARMY
WASHINGTON

JUL 14 2006

The Honorable Christopher Shays
Chairman
Subcommittee on National Security, Emerging
Threats and International Relations
Committee on Government Reform
United States House of Representatives
Washington, DC 20515

Dear Mr. Chairman:

Thank you for your letter to the Secretary of Defense requesting information from then Brigadier, now Major General Jerome Johnson, Commander U.S. Army Field Support Command, regarding the cost of third-tier subcontractors for security contracts under the Army's Logistics Civil Augmentation Program (LOGCAP). Secretary Rumsfeld has asked me to respond on his behalf.

Based on information provided to the Army by Kellogg, Brown and Root (KBR), KBR has never directly hired a private security contractor in support of the execution of a statement of work under any LOGCAP III Task Order. Additionally, KBR has queried ESS and they are unaware of any services under the LOGCAP contract that were provided by Blackwater USA. KBR is continuing to look into whether any private security firm may have been hired by ESS or any other subcontractor (including Regency Hotel) in support of LOGCAP III.

Appendix

Under the provisions of the LOGCAP contract, the U.S. military provides all armed force protection for KBR unless otherwise directed. Additionally, the LOGCAP contract states that KBR personnel cannot carry weapons without the explicit approval of the theater commander. To date, KBR has not pursued any requests under the LOGCAP contract for personnel to carry weapons nor has the theater commander directed or authorized KBR or any LOGCAP subcontractor to carry weapons. KBR has stated they have no knowledge of any subcontractor utilizing private armed security under the LOGCAP contract.

In regards to your request for reports analyzing the cost of paying contractors for security services or logistical support, we are unaware of any Department of Defense reports in these areas. The Congressional Budget Office (CBO) has produced a report titled "Logistics Support for Deployed Military Forces," dated October 2005 which compares the cost of paying contractors to provide security services or logistical support under the LOGCAP contract with the cost to the Army of providing the services or support itself. A copy of that report is enclosed.

With respect to withholding payments, the Office of the Secretary of Defense approved a deviation to Federal Acquisition Regulation clause 52.216.26, "Payments of Allowable Costs Before Definitization," on February 2, 2005, for task orders issued under the LOGCAP contract (DAAA09-02-D-0007). The deviation authorizes the Department of the Army to reimburse and make payment to the LOGCAP prime contractor on undefinitized task orders at rates up to 100 percent of allowable costs until June 30, 2005 or until the contract actions are definitized, whichever occurs first. The deviation has been extended to June 30, 2007. Given the volatility in requirements under contingency contracting, it is foreseeable there may be additional undefinitized task orders under LOGCAP. However,

since March 2005, the use of Undefinitized Contract Actions has been minimized to the maximum extent possible and all such actions issued under the LOGCAP contract have been definitized within the 180 day regulatory requirement.

A process has been developed in conjunction with the Defense Contracts Audit Agency, Army pricing specialists, and the contracting officer to evaluate unsupported costs. KBR is required to provide supporting documentation to the satisfaction of the contracting officer prior to the cost being accepted. I have asked the Office of the Chief of Legislative Liaison (OCLL) to work directly with your staff to address any specific issues surrounding unsupported costs, or other issues needing additional clarification.

Finally, regarding the request for copies of KBR's subcontract with ESS and Regency Hotel, as well as any consent package for the KBR-ESS subcontract, this information has been requested from KBR, and will be forwarded to Committee staff upon receipt.

I trust this information will resolve the matter to your satisfaction. I am providing a courtesy copy of this letter to Representative Waxman.

Sincerely,

s/ Francis J. Harvey
Francis J. Harvey

Appendix

Haliburton Statement
12/07/2006

All information available to KBR confirms that Blackwater's work for ESS was not in support of KBR and not under a KBR subcontract.

Blackwater provided services for the Middle East Regional Office of KBR. This office is not associated with any government contract and not associated with LOGCAP III. These services were provided outside of the Green Zone and were not directly billed to any government contract.

Melissa Norcross
Public Relations
Haliburton